APPEALS BOARD
UTAH LABOR COMMISSION

MICHAEL MCGEE, **Petitioner,** **vs.** **LPI SERVICES and TRAVELERS INSURANCE COMPANY,** **Respondents.**	**ORDER AFFIRMING ALJ'S DECISION** **Case No. 02-1225**

LPI Services and its insurance carrier, Travelers Insurance Company (referred to jointly as "LPI" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's preliminary determination that Michael McGee is permanently and totally disabled for purposes of the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. McGee claims permanent total disability compensation for a low back injury he suffered on July 4, 2001, while working for LPI. After holding an evidentiary hearing on the claim, Judge La Jeunesse concluded that Mr. McGee had satisfied the criteria of §413(1)of the Act and was, therefore, entitled to a preliminary determination of permanent total disability.

Among the criteria for permanent total disability contained in §413(1)(c)(iv) is the requirement that the injured worker "cannot perform other work reasonably available, taking into account the employee's: (A) age; (B) education; (C) past work experience; (D) medical capacity; and (E) residual functional capacity." In applying this standard to Mr. McGee's claim, Judge La Jeunesse relied on the Commission's Rule 612-1-10.D.1.c. to conclude that no work was reasonably available to Mr. McGee.

In seeking review of Judge La Jeunesse's decision, LPI argues that the requirements of Rule 612-1-10.D.1.c are contrary to the statutory provisions of § 413(1)(c)(iv). Alternatively, LPI argues that, even if Rule 612-1-10.D.1.c is valid, it cannot be applied retroactively to Mr. McGee's claim.

FINDINGS OF FACT

LPI does not contest Judge La Jeunesse's findings of fact. The Appeals Board therefore adopts those findings.

DISCUSSION AND CONCLUSIONS OF LAW

Compatibility of Rule 612-1-10.D.1.c with § 413(1)(c)(iv). In considering LPI's arguments, the Appeals Board acknowledges the fundamental principle that administrative rules must comply with statutory directives. In *Sanders Brine Shrimp v. Audit Division*, 846 P.2d 1304, 1306 (Utah 1993), the Utah Supreme Court stated:

> It is a long-standing principle of administrative law that an agency's rules must be consistent with its governing statutes. Thus, a rule that is out of harmony with a governing statute is invalid. (Internal citations omitted.)

In this case, § 34A-2-413(1)(c)(iv) is the governing statute. It provides as follows (emphasis added):

> (c) To find an employee permanently totally disabled, the commission shall conclude that:
>
> . . . .
>
> (iv) the employee cannot perform other work **reasonably** available, taking into consideration the employee's:
>
> (A) age;
> (B) education;
> **(C) past work experience;**
> (D) medical capacity;
> (E) residual functional capacity.

The foregoing statute was enacted in 1995. Thereafter, stakeholders in the workers' compensation system asked the Commission to promulgate standards for determining whether other work was "reasonably" available within the meaning of § 413(1)(c)(iv). The Commission convened an ad hoc committee with representatives from the applicants' bar, insurance carriers and employers. The committee proposed what is now Rule 612-1-10.D.1.c. The rule was discussed and approved by the Workers' Compensation Advisory Council established by § 34A-2-107 of the Act, then discussed at public hearings. The Commission promulgated the rule in January 2001and it has remained in effect since then. Rule 612-1-10.D.1 provides as follows:

> 1. Other work reasonably available: Subject to medical restrictions and other provisions of the Act and rules, other work is reasonably available to a claimant if such work meets the following criteria:
>
> a. The work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance, or is within the distance the claimant was traveling to work prior to his or her accident;
>
> b. The work is regular, steady, and readily available; and

c. The work provides a gross income at least equivalent to:

(1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or

(2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

LPI now contends that subsection (c) of Rule 612-1-10.D.1 is invalid because it exceeds the scope of § 413(1)(c)(iv). Section § 413(1)(c)(iv) requires the Commission to determine whether other work is "reasonably available," taking into consideration, among other factors, the injured worker's "past work experience.**"** In effect, LPI argues that "past work experience" refers **only** to the injured worker's duties at work, and not to any of the other terms and conditions of the work environment. Thus, under LPI's interpretation, aspects of the injured worker's past employment such as location, wage, or hours cannot be considered.

On the other hand, the Commission's Rule 612-1-10.D.1 takes a broader view of the statutory term "past work experience." Under the rule, "past work experience" includes an injured worker's job duties, but also includes other aspects of the employment contract. The rule therefore takes into account the location of the injured worker's residence and past employment, previous wage levels, and the availability and regularity of alternative work. The Appeals Board finds the rule to be reasonable, consistent with the structure and purposes of the workers' compensation system, and within the Commission's authority.

The Appeals Board notes LPI's argument that provisions of the Utah Injured Worker Reemployment Act ("Reemployment Act"; Title 34A, Chapter 8, Utah Code Annotated) must be considered in interpreting § 34A-2-413(1)(c)(iv)'s test of "other work reasonably available." While it is true that § 34A-2-413 of the Utah Workers' Compensation Act makes passing reference to the Reemployment Act, the Appeals Board finds no basis to conclude that the Legislature intended to incorporate the various definitions of the Reemployment Act into § 413. But even if such an incorporation were intended, § 34A-8-104(3) of the Reemployment Act itself defines "gainful employment" in terms of work that is "reasonably feasible" and "reasonably attainable" in consideration of the injured worker's past "experience." Thus, the Reemployment Act's statutory formulation is only slightly different from that of § 34A-2-413(1)(c)(iv) and, for the reasons already stated above, is not violated by the Commission's Rule 612-1-10.D.1.

Finally, LPI argues that Rule 612-1-10.D.1 cannot be applied to claims based on injuries that occurred before the rule was promulgated. However, it is § 413(1)(c)(iv), rather than Rule 612-1-10.D.1, which gives rise to Mr. McGee's right to benefits. The rule does nothing more than explain how the Commission will exercise the discretion conferred by § 413(1)(c)(iv), to determine whether

other work is "reasonably" available to Mr. McGee. In light of the provisions of the underlying statute and the function of the Commission's rule, the Appeals Board finds no reason why the rule cannot be applied to Mr. McGee's claim.

In summary, the Appeals Board concludes that Rule 612-1-10.D.1 is consistent with the provisions of § 34A-2-413(1)(c)(iv). The Appeals Board further concludes that Judge La Jeunesse properly applied the rule to Mr. McGee's claim.

ORDER

The Appeals Board affirms Judge La Jeunesse's decision. It is so ordered.

Dated this 28th day of December, 2006.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch